

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JAN 11 1996

FEDERAL

In the Matter of:)	
)	
Revision of Rules and Policies)	IB Docket No. 95-168
for the Direct Broadcast Satellite)	PP Docket No. 93-253
Service.)	
)	

EMERGENCY PETITION TO STAY

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Dated: January 11, 1996

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SUMMARY

EchoStar Satellite Corporation ("EchoStar"), pursuant to Section 405(a) of the Communications Act of 1934, as amended, and Section 1.43 of the Commission's Rules, respectfully requests an emergency stay of the Commission's Report & Order released December 15, 1995, in the above-captioned proceeding to the extent it directs the Wireless Bureau to auction certain Direct Broadcast Satellite ("DBS") channels allocated to the United States by the International Telecommunication Union ("ITU"). Report & Order, 60 Fed. Reg. 65587 (published Dec. 20, 1995). EchoStar recently launched its first DBS satellite and the scheduled auction of DBS channels would wrongfully eliminate EchoStar's right to receive additional DBS channel assignments that could be used to increase the channel capacity of that satellite by approximately thirty percent.

The Wireless Bureau, pursuant to delegated authority, has set January 24, 1996, as the date for conducting the Commission's auction of 28 DBS channels at 110° W.L. and 24 DBS channels at 148° W.L.¹⁴ EchoStar respectfully requests that the Commission act on this motion no later than January 12, 1996, in order to allow for sufficient time to appeal to the courts any adverse Commission decision.

¹⁴ Public Notice, Report No. AUC-95-08 (rel. Dec. 21, 1995).

As set forth herein, EchoStar demonstrates that all of the requirements for granting a stay of the scheduled DBS auction are met in this case. First, EchoStar is likely to prevail on the merits in its anticipated appeal of the Report & Order, not only because the Commission's decision to conduct a DBS auction is clearly arbitrary, capricious and unsupported by the evidence in the record, but also because it is contrary to the law and the rights of EchoStar and other DBS permittees. The Report & Order impermissibly opens to newcomers the cut-off window for DBS applications established in the Continental processing round some seven years ago,²⁴ and erroneously asserts that the Commission is free to violate its own cut-off rules, without need for a finding of unusual and compelling circumstances. Report & Order ¶¶ 144-145. The Commission, moreover, admits that by conducting its first auction of DBS channels in lieu of reallocating them pursuant to Continental, it will be taking away EchoStar's right to up to five additional DBS channels. Report & Order ¶ 135 & n. 259. EchoStar has invested hundreds of millions of dollars in its DBS system in substantial reliance on its right to additional DBS channels. The Commission's utter disregard for EchoStar's right to additional DBS channels is inconsistent with other Commission auction decisions involving different services wherein

²⁴ Continental Satellite Corp., 4 FCC Rcd. 6292 (1989).

the Commission has recognized the reliance interests of pre-auction applicants.

The Commission also lacks the authority to conduct auctions of DBS channels. It has disregarded its statutory duty to attempt to avoid mutual exclusivity by methods other than auctions. 47 U.S.C. § 309(j)(6)(E). Turning this statutory mandate on its head, the Commission, in fact, has tried to create mutual exclusivity by impermissibly reopening the Continental processing round. Nor does an auction in this case satisfy the statutory criteria of expedition and efficiency. 47 U.S.C. § 309(j)(3). To the contrary, had the Commission simply applied its Continental decision in lieu of an auction, it would have achieved a more efficient and expeditious use of the DBS spectrum.

Second, absent a stay of the scheduled auction, EchoStar will suffer irreparable injury. With the successful launch of its first satellite, EchoStar soon will be introducing competitive DBS service into the United States market. During this critical time, EchoStar will only be able to operate 11 of the 16 transponders on that satellite (i.e., approximately 75 instead of 110 video channels), except possibly on a Special Temporary Authority basis. With a limited number of channels EchoStar will not be an effective competitor to the incumbent DBS

service provider (the alliance of DIRECTV/USSB, which offers up to 200 video channels) or the many cable television systems operating in the United States with upgraded facilities. Under Continental, EchoStar could use all 16 transponders on its first satellite and introduce its service by mounting a viable competitive offering. Moreover, a January 1996 auction will irreparably harm EchoStar's plans with respect to the western satellite of its DBS system as well as require EchoStar to incur unrecoverable expenses in order to participate as a bidder pending court review.

Third, a grant of the requested stay would not harm, but rather would benefit, other interested parties, as well as serve the public interest, whether or not a court were to reverse the Commission on the merits. Indeed, the Commission itself has recognized that the pendency of appellate review is an unwelcome cloud over its scheduled DBS auction.^{1/}

^{1/} See FCC Response at 5-6, Tempo DBS, Inc. v. FCC, Nos. 95-1560 et al. (D.C. Cir. 1995).

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The Wireless Bureau, pursuant to delegated authority, has set January 24, 1996, as the date for conducting the Commission's auction of 28 DBS channels at 110° W.L. and 24 DBS

channels at 148° W.L.¹⁴ EchoStar respectfully requests that the Commission act on this motion no later than January 12, 1996, in order to allow for sufficient time to appeal to the courts any adverse Commission decision. Absent Commission action, EchoStar will move a competent court of appeals to stay the Report & Order on that date.

I. STATEMENT OF FACTS

The United States has been allotted by the ITU only eight orbital locations -- four "eastern" and four "western" slots -- for the provision of DBS service. Only three of the eastern slots -- 101° W.L., 110° W.L. and 119° W.L. -- are suitable for service to the entire continental United States ("full-CONUS").²⁴ Thirty-two DBS channels are available from each of these locations.

The Commission's Rules provide that applications for DBS systems are to be processed in groups or processing rounds. 47 C.F.R. § 100.15. The Commission is to place new DBS applications on public notice and prescribe a cut-off date for competing applications. Only applications filed by the cut-off date are given equal status. Id.

¹⁴ Public Notice, Report No. AUC-95-08 (rel. Dec. 21, 1995).

²⁴ See Revision of Rules and Policies for the Direct Broadcast Satellite Service, Notice of Proposed Rulemaking, FCC 95-443, IB Docket No. 95-168, PP Docket 93-253 at ¶ 18 (rel. Oct. 30, 1995).

The current DBS processing round was opened by the Commission's Public Notice accepting for filing the DBS system applications of EchoStar and Continental Satellite Corporation ("Continental"). See Report No. DBS-5A (rel. Feb. 23, 1988). EchoStar applied for two satellites utilizing 16 eastern and 16 western channels. The Commission established April 8, 1988, as the cut-off date beyond which no further applications would be considered with the same priority. In response to that Public Notice, the Commission received additional applications from six other applicants. EchoStar Comments at 2-3 (Nov. 20, 1995).

The Commission has not fully disposed of the applications in this 1988 Continental processing round. The Commission held that while all pending applicants were fully qualified, the available channels and orbital locations were not sufficient to satisfy the orbit/spectrum requests of each applicant. Continental, 4 FCC Rcd. at 6299. In order to avoid a finding of mutual exclusivity, the Commission chose instead: (1) to grant, in part, all of the applications for as many channels as could be accommodated on a proportionate basis; and (2) to give these applicants the right to receive additional channels, up to the number requested in their applications, upon the cancellation of any DBS permits. Id. As a result, EchoStar received a permit to utilize only 11 eastern and 11 western DBS

channels, and the right to receive 5 additional eastern and 5 additional western DBS channels. Id.

In 1992, the Commission granted EchoStar 11 eastern DBS assignments at 119° W.L. upon EchoStar's showing that it had completed contracting for a 16-transponder satellite. EchoStar Satellite Corp., 7 FCC Rcd. 1765 (1992). Thereafter, EchoStar invested hundreds of millions of dollars in construction, launch and other costs to develop its DBS system. A 16-transponder satellite costs tens of millions of dollars more to construct and launch than a satellite with only 11 transponders. In deciding to construct a 16-transponder satellite, EchoStar relied on its right to receive additional DBS channels. Ergen Decl. I ¶¶ 3-4 (Nov. 17, 1995)(App. A). EchoStar also relied on this right to additional channels in deciding to proceed with its system in the first place. Id. ¶¶ 5-9.

On October 16, 1995, the Commission canceled the DBS permit of Advanced Communications Corporation ("Advanced"). Advanced Communications Corp., FCC 95-428 (rel. October 18, 1995). The Commission had assigned to Advanced 27 channels at 110° W.L. and 24 channels at 148° W.L. As a result of this cancellation, these channels became available for reassignment. On December 15, 1995, the Commission released the instant Report & Order delegating to the Wireless Bureau authority to auction

off all of the Advanced eastern and western channels plus one unassigned channel at 110° W.L.

The Commission recognized that it had given the 1988 Continental round permittees, including EchoStar, a right to additional channels, but nonetheless decided to expunge their rights. Instead, the Commission has chosen to open these channels up to future applicants who obviously have not filed their applications by the Continental cut-off date established some seven years ago. In deciding to auction off these channels, the Commission now believes that just two applications would give rise to a situation of mutual exclusivity. The Report & Order asserts that an auction under such circumstances would comply with the requirements of the Communications Act.

II. RELIEF REQUESTED

EchoStar respectfully requests that the Commission stay, pending judicial review, that portion of its Report & Order which directs the Wireless Bureau to auction the available DBS channels at 110° W.L. and 148° W.L.

III. ARGUMENT

A party requesting a stay of an agency action must demonstrate that: (1) it is likely to prevail on appeal; (2) it will suffer irreparable injury if the stay is not granted; (3) other interested parties will not be harmed if the stay is

granted; and (4) the public interest favors granting the requested stay. Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958).

A. EchoStar Is Likely to Prevail on the Merits

The Commission's decision to auction off available DBS channels in lieu of upholding the Continental rights of existing permittees is arbitrary, capricious, contrary to law and unsupported by the record in this proceeding.

1. The Commission's DBS auction violates its own cut-off rules

By deciding to accept new applications for the reclaimed Advanced channels, the Commission has violated its own cut-off rules without adequate justification or the requisite finding of exceptional circumstances. The Commission concedes that its decision to conduct an auction "may be analogous to reopening the prior processing window in that spectrum awarded in that round will now be available to entities that were previously cut off from applying for it" Report & Order ¶ 144. The Commission then asserts that its action is "nonetheless distinguishable," but does not explain this conclusory assertion or set forth any distinction whatsoever. Id. Rather, the Commission claims that it is free to reopen a processing round where the public interest justifies doing so. Id.

Contrary to the Commission's assertions, the cases cited by EchoStar and Directsat in their comments do not "stand only for the proposition that the Commission ... does not abuse its discretion if it chooses not to waive [its cut-off] rules for a non-complying applicant." Id. They also establish that the Commission is not free to waive its cut-off rules except in the most "unusual and compelling" circumstances.³⁴ The Commission has utterly failed to assert any such circumstances justifying a waiver of its cut-off rules in its Report & Order. In fact, none of the extraordinary circumstances that have been found to justify a waiver of the cut-off rules is present here.⁴⁴

³⁴ See In re Application of Cook, Inc., 10 FCC Rcd. 160, 161 (1967), appeal dismissed sub. nom., Cook, Inc. v. United States, 394 F.2d 84 (7th Cir. 1968); Bronco Broadcasting Co., 50 F.C.C.2d 529, 533 (1974) ("cut-off procedures are observed in all cases except where unusual and compelling circumstances require otherwise"); Prairie Broadcasting Co., 47 F.C.C.2d 373, 377 (1974). Nor does the Commission appear cognizant of the long-settled rule that agencies should follow their own rules and are not free to violate them. See Service v. Dulles, 354 U.S. 363, 388 (1957); Reuters Limited v. FCC, 781 F.2d 946 (D.C. Cir. 1986).

⁴⁴ The Commission has waived its cut-off rules where: an applicant has filed a timely request for the waiver of the cut-off date, Denton Channel Two Found., Inc., 85 F.C.C.2d 983, 985 (1981); the public notice for the cut-off was defective, Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1560 (D.C. Cir. 1987), Way of Life Television Network, Inc. v. FCC, 593 F.2d 1356 (D.C. Cir. 1979), Salzer v. FCC, 778 F.2d 869, 875 (D.C. Cir. 1985), Ridge Radio Corp. v. FCC, 292 F.2d 770 (D.C. Cir. 1961); the Commission failed to follow its own precedent or that precedent was unclear, Green Country Mobilephone, Inc. v. FCC, 765 F.2d 235 (D.C. Cir. 1985), Radio Athens, Inc., (WATH) v. FCC, 401 F.2d 398 (D.C. Cir. 1968), Dudley Station Corp., 18 F.C.C.2d

(continued ...)

2. Auctioning DBS channels arbitrarily removes the rights of EchoStar and other Continental permittees to additional channels

The Commission recognizes, as it must, that it has given Continental permittees "a claim to any channels that became available due to cancellation of another's permit, and that from this claim arose expectations upon which the permittees acted." Report & Order ¶ 142. The Commission adds that it does "not lightly disappoint permittees' claims and expectations," but concludes that those claims are outweighed by "the public interest in abandoning the Continental reassignment methodology discussed at length above." Id. This oblique reference to the "public interest" presumably implicates the Commission's assessment that, in contrast with auctions, the Continental reassignment methodology "would impede prompt delivery of service to the public." Id. ¶ 135. This assessment, however, is arbitrary and capricious, and contrary to the record in this proceeding.

Application of the Continental methodology would not, as the Commission claims, impede prompt delivery of DBS service to the public. To the contrary, the faithful application of the Continental decision will result in the entire use of all three full-CONUS DBS locations by 1996. EchoStar Comments at 32-37.

⁴⁴ (... continued)

898 (1969). See also Alabama Citizens for Responsive Pub. Television, 53 F.C.C.2d 457 (1975); Southeast Texas Broadcasting Co., 5 F.C.C.2d 596 (1966).

The Commission asserts that the Continental methodology would require a system of channel swaps to consolidate assignments, assumes that this system would have to be negotiated by the parties, and opines that the process "is often a time consuming one that is not always successful." Report & Order ¶ 135 (emphasis added).

Of course, the Commission -- despite its statutory duty to explore alternatives to auctions -- has never tested this process for reassigning channels under Continental. Nor did it afford the DBS permittees any time to explore alternative methods of applying Continental, and thereby allow the Commission to identify the most efficient methodology for reassigning channels. In any event, the Commission's objections to applying the Continental methodology are based on an erroneous premise -- that application of Continental must command the agreement of all parties with rights to additional channels. The Commission is free to resolve mutual exclusivity by implementing sharing plans that do not necessarily have the agreement of all the applicants in a processing round, and has in fact repeatedly done so in other proceedings.

3. The disregard of EchoStar's Continental rights is inconsistent with the treatment of other pre-auction incumbents in other proceedings

This is the only case in which the Commission, when deciding whether to conduct auctions, has failed to give any cognizance to the reliance interests of pre-auction incumbents.^{5/}

Ironically, this proceeding is the one in which such reliance interests are the strongest. In the MDS proceeding, the Commission refrained from conducting auctions with respect to pre-auction applicants because they had filed applications in reliance on the expectation that the Commission would apply a non-auction methodology. Here, EchoStar and possibly other DBS permittees have done more than just file an application.

^{5/} See, e.g., In the Matter of Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and on the Instructional Television fixed Service and Implementation of Section 309(j) of the Communications Act Competitive Bidding, Report and Order, 10 FCC Rcd. 9589 (1995) ("MDS") (previously filed Multipoint Distribution Service applications should not be subject to auctions); Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging System at 929-930 MHz., 8 FCC Rcd. 8318 (1993) (acknowledging existing investments by granting exclusive channel rights to certain paging companies); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 9 FCC Rcd. 7387, 7391-92 (1994) (applications for cellular telephone radio service should not be subject to auctions because applicants relied on the lottery procedures and an auction would result in delay and substantial costs to the applicants); New Personal Communications Services Pioneer's Preference Review, Docket No. 90-314, ET Docket No. 93-266, FCC 94-209 (rel. Aug. 18, 1994) (granting pioneers that received preferences in a pre-auction environment a discount off an auction-determined price); Nationwide Wireless Network Corp., 9 FCC Rcd. 3635 (1994) (granting pioneer a discount off an auction-determined price).

EchoStar, for example, has invested several hundreds of millions of dollars in a satellite system based, in substantial part, upon its rights to additional channels. Moreover, EchoStar has relied on more than just the expectation that it would be processed pursuant to a non-auction methodology; it has relied on a right it has already received pursuant to the application of such a methodology.

The Commission cannot rationally distinguish the MDS proceeding by stating that its treatment of previously filed MDS applicants "does not stand for the proposition that equitable interests of particular entities outweigh the public interest in auctions in all contexts." Report & Order ¶ 146. It is arbitrary and capricious to protect an applicant's reliance interest when it has merely expended funds to prepare and file an application, and disregard similar interests when a permittee has actually constructed a satellite in reliance upon certain rights granted to it by the Commission. See Delmarva Power and Light Co. v. FERC, 770 F.2d 1131, 1143 n.9 (D.C. Cir. 1985); Dep't of Treasury v. FLRA, 707 F.2d 574 (D.C. Cir. 1983). Such disparate treatment also violates the ban on selective retroactivity established by the Supreme Court in James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1971).

4. The Commission lacks the authority to conduct auctions in this case

The Omnibus Budget Reconciliation Act of 1993 makes clear that the grant of auction authority does not absolve the Commission of its duty to process applications that may be mutually exclusive by methods other than competitive bidding. 47 U.S.C. § 309(j)(6)(E). In its haste to conduct an auction of the reclaimed Advanced DBS channels, the Commission did not satisfy this statutory requirement. As previously indicated, the Commission failed to consider any specific method for applying Continental on the mistaken belief that such a method would require agreement among all of the parties, and on the further unsupported assumption that the process for reaching such agreement is "often" time-consuming and "not always" successful. See supra p. 9. Instead of seeking to avoid mutual exclusivity by means other than auctions, as required by the law, the Commission has chosen to create mutual exclusivity by reopening the processing round in order to conduct an auction.

Moreover, an auction here would not satisfy most of the statutory criteria for determining whether competitive bidding is appropriate -- i.e., development and rapid deployment of new technologies, enhancement of economic opportunity and competition, and efficient and intensive use of the spectrum. 47 U.S.C. § 309(j)(3). An auction of the reclaimed channels would fragment the DBS spectrum, thereby leaving several DBS channels

fallow and leading to inefficient and non-intensive use of the spectrum. By carving out a block of 28 channels at 110° W.L., the Commission would leave Directsat stranded with one commercially unviable channel and USSB would similarly be left with three unviable channels at the same location.^{6/} An auction of the 110° W.L. channels would also most likely delay DBS service from that location. The winning bidder would have four years in which to construct its first satellite, while application of the Continental decision would ensure the use of all DBS assignments at all three full-CONUS orbital locations, and the deployment of DBS satellites by the end of 1996.

The Commission asserts that "[t]here is no reason to assume that it will take the auction winner until at least January 2000 to complete a first satellite," and that "[t]he auction winner may be an entity that has already begun construction or even launched a satellite." Report & Order ¶ 160. In fact, the only companies that have substantially completed construction of DBS satellites -- EchoStar, Directsat, DirecTV and, reportedly, Tempo -- are barred under the Commission's Rules from participating in an auction unless they divest themselves of their other full-CONUS assignments. Such divestiture would, of course, leave those divested assignments

^{6/} An auction would also perpetuate the current fragmentation of the 119° W.L. and 61.5° W.L. slots, whereas the application of Continental would cure that fragmentation. EchoStar Comments at 32-37.

unused for the indefinite future. The Commission opens the door to newcomers who have not started building DBS satellites, while inhibiting incumbents that have DBS satellites at their disposal from fully utilizing the three full-CONUS locations. This auction plan can only result in further delays in bringing DBS service to the public.

B. EchoStar Will Suffer Irreparable Injury Absent A Stay

EchoStar will suffer irreparable injury if the Commission fails to grant a stay of the scheduled auction of DBS channels at 110° W.L. EchoStar has just launched its first satellite, and is now faced with the critical hurdle of introducing its DBS service to the U.S. market. EchoStar will have to compete for subscribers against other DBS operators with the capacity to provide as many as 200 video channels and with many cable television systems with over 80 channels of programming. At this decisive time for EchoStar, an auction of DBS channels in lieu of the Commission's reassignment policy would prevent EchoStar from utilizing on a firm basis 5 of the 16 transponders on its first satellite. With these transponders, EchoStar would only be able to offer about 75 video channels to consumers, compared to about 110 video channels if EchoStar were able to utilize the entire satellite capacity under long-term agreements. Such an initial channel limitation will place EchoStar at a competitive disadvantage vis-à-vis incumbent

multichannel video programming distributors. EchoStar's loss of this opportunity cannot be valued nor remedied with money damages. See Barnstead Broadcasting Corp. v. Offshore Broadcasting Corp., 865 F. Supp. 2 (D.D.C. 1994) (loss of opportunity to produce weekly public affairs programming constitutes irreparable injury).¹¹

Allowing the scheduled auction of the 148° W.L. channels to proceed would also cause EchoStar irreparable harm by causing delays in the construction of its western satellite. EchoStar awaits its western orbital assignments from the Commission and has a strong preference for channels at the 148° W.L. location.¹² If these channels are auctioned, EchoStar will have to proceed with construction of its western satellite based on the assumption that it will operate from a different western slot. If the scheduled auction is invalidated by the courts and the 148° W.L. assignments become available to EchoStar, it will have to retrofit this satellite, causing significant unrecoverable additional costs and scheduling delays.

¹¹ On the other hand, a stay would enable EchoStar to negotiate with the other DBS permittees and reach an arrangement whereby each permittee could exercise its Continental rights and aggregate channels at the same orbital location pending expedited court review.

¹² Historically, the Commission has given DBS permittees the channels of their preference subject to availability. See, e.g., Direct Broadcasting Satellite Corp., 8 FCC Rcd. 7959, 7961 (1993).

Furthermore, if the Commission proceeds with the scheduled auction, EchoStar will be compelled to participate as a bidder so as not to forfeit access to the auctioned channels. To assemble the necessary financing, EchoStar will need to incur millions of dollars of additional expense in investment banking and/or loan commitment fees. It will also need to devote substantial other resources in order to participate in such an auction. Ergen Decl. II ¶ 15 (App. B). If the courts were to later invalidate the auction, EchoStar will not be able to recover any of these expenses, and will thus be irreparably injured.

C. A Stay of the DBS Auction Will Not Harm Other Interested Parties and Will Benefit the Public

A stay of the Commission's decision to auction off the Advanced channels will not injure other interested parties (including prospective bidders), other DBS permittees or the public. In fact, all of these parties and the public stand to benefit from a grant of the requested stay.

If EchoStar prevails on the merits, all bidders will be spared the expense of allocating resources to an auction that will ultimately be invalidated. The requested stay would also benefit the winning bidder by sparing it the expense of commencing construction of DBS satellites that cannot be used at any orbital location. Even if EchoStar were to lose its appeal

on the merits, prospective bidders would still benefit as the auction would no longer be clouded by the contingency of judicial review and they would be able to assess the value of the channels to be auctioned.^{2/}

Lastly, the requested stay serves the public interest because it prevents the wasteful use of Commission resources in preparing and holding an auction that may ultimately be invalidated by the courts. An auction would also substantially delay competitive DBS service to the public, and would result in less intensive use of the DBS spectrum compared to the reassignment of available DBS channels in accordance with Continental. Even assuming EchoStar were not to prevail on the merits, the requested stay would not appreciably delay service to the public because the winning bidders will be allowed four more years to construct and build their first satellites in any case.

Indeed, in the pending appeal of the Commission's Advanced Order, the Commission itself has recognized that the pendency of appellate review would "cloud over" any assignment made in the scheduled January auction. As the Commission

^{2/} Advanced, Tempo and Primestar Partners L.P. ("Primestar") will similarly benefit from a stay, since they have already appealed the Advanced Order and are seeking to avert an auction. Indeed, Tempo and Primestar have asked the court for expedited consideration of their appeals, so that a decision may be reached before any auction of the Advanced channels is held. Appellants' Joint Motion for Expedited Consideration, Tempo DBS, Inc. v. FCC, Nos. 95-1560, et al. (D.C. Cir. 1995). Directsat, Continental, Tempo and Hughes will also benefit since a stay will preserve their Continental rights to additional channels.

explained, the bare possibility that the auction may be set aside will make it unlikely that an assignee "may affect decisions regarding the substantial investments required in constructing a satellite to provide DBS service" FCC Response at 5-6, Tempo, Nos. 95-1560 et al. The Commission further stated that such uncertainty would delay the deployment of DBS service to the public. Id. at 6. For these very same reasons, judicial review of the Commission's decision to auction Advanced's canceled channels should be completed prior to any auction of those channels.

IV. CONCLUSION

For the foregoing reasons, the Commission should stay that portion of its Report & Order which directs the Wireless Bureau to conduct an auction of certain DBS channel assignments pending judicial review of the Commission's actions.

Respectfully submitted,

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Dated: January 11, 1996

CERTIFICATE OF SERVICE

I, Pamela S. Strauss, hereby certify that a copy of the foregoing Emergency Petition to Stay of EchoStar Satellite Corporation was hand-delivered on this 11th day of January, 1996, to the following:

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